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No. 673.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

H. B. NELSON CONSTRUCTION COMPANY,
PETITIONER,

v.

THE UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

PETITION FOR REHEARING.

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Counsel for Petitioner.

Dated: March , 1941.

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ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

PETITION FOR REHEARING.

Comes now the above named petitioner, Nelson Construction Company, and presents this its petition for a rehearing on its application for a writ of certiorari to review the judgment of the Court of Claims in the above entitled cause. Petitioner's application for such writ was denied by this Court on March 3, 1941.

Ground for Rehearing.

This petition for a rehearing is filed under Rule 33 of this Court.

The primary ground for this petition is the departure by the Court of Claims from the accepted and usual course of judicial proceedings within the meaning of Rules 41 and 38, subdivision 5, of this Court, in failing to make findings of fact on the material issues

which, uncorrected, would deny a judgment required by uncontradicted and sufficient evidence, in conflict with the decisions of the Court of Claims, of this Court, and of the various Federal Circuit Courts of Appeal, evidenced by the facts that:

1. The Court of Claims based its decision entirely upon the erroneous theory that petitioner's claim for damages for radical, revolutionary changes, and experimental work required by the Government which are outside the contract, is controlled by the provisions of the contract. (R. 17, 18, 23, 24.)

2. Because of its reliance upon such provisions, the Court of Claims did not concern itself with what are conceded by respondent's counsel in his brief to be the undisputed facts of the case as set out in the Petition and Brief, pages 2-10, material to the problem involved.

3. The Court of Claims failed to make special findings of fact, undisputed facts, requested by petitioner, which it was required to make under Rule 41 and the decisions of this Court. (Spec. of Errors, ps. 10-16.)

4. The result reached by the Court of Claims cannot be reconciled with or sustained by the admitted facts which clearly entitle petitioner to the recovery asked for under the decisions of this Court, the Court of Claims and the Circuit Courts of the United States. (Petitioner's Brief, ps. 31-26.)

I.

The Court of Claims did not complete the trial of this case, but left it wholly undetermined. It did not make findings on either one of the two material issues described under (a) and (b) hereinbelow.

(a) The Court below refused to find the following undisputed facts,—

(1) That there were 65 major changes (R. 28, 29), —one every third day for most of the 400 days the work was in progress (R. 28), and every fourth day for the remainder; (R. 28, 29), Change Orders A and B being a summary of these changes (R. 28, 29, 17, 18);

(2) That minor changes were made from day to day the 400 days the work was in progress, (not included in the Change Orders; (*Id.*);

(3) That these minor and major changes created an unsettled condition, broke the morale of petitioner's force, and at times prevented the working of the full force of several hundred men, (R. 28, 19);

(4) That petitioner expended in doing the work $322,030.40 (R. 28);

(5) That the increase in cost over the contract price of $275,889.00 was $34,187.69, which, with a 10% profit amounting to $32,203.04, and ½% for the bond, amounting to $5,313.50, makes a total of $71,-704.19 (*Id.*);

(6) That no proof was offered that any of the expenditure was extravagant or unnecessary; and

(7) That,—(because of these undisputed circumstantial facts petitioner is entitled, under this Court's Rule 41, to a finding of the ultimate fact),—there were material quantities of work resulting from the multitude of alterations, substantially variant in character and cost from that contemplated by the parties when they made their agreement, which constituted new and different work which petitioner was required to do and did (R. 28-31);

(8) It was material that the Court below make the above described findings, as through them petitioner becomes entitled to recover $71,704.19, the extra cost and a profit. (See authorities pages 3 and 4 of Reply Brief.)

(b) The Court below refused to find the following undisputed facts,—

(1) That respondent required petitioner to tear out parts of the buildings, change the locations, and take the men off the work; that respondent found repeatedly that the work ordered did not meet its needs, and so petitioner was given orders to go ahead, and in a few days an order to stop, and in a few days more another change, which kept on repeating itself many months; that the costs were increased by this unsettled condition; that it was almost impossible to keep materials and men coordinated, and it broke the morale of petitioner's force (R. 28, 29); and

(2) That, (as a result of these undisputed circumstantial facts petitioner is entitled to a finding of the ultimate fact), respondent required petitioner to construct the buildings in an experimental way,—having something constructed today, and tomorrow finding that it did not answer its needs, and requiring petitioner to tear it down, and construct something else (R. 29).

(3) The two findings of fact last above described constitute not alone a material but a controlling issue, as they show the exercise of unwarrantable superintendence, and an improper interference with the work, entitling petitioner to recover the loss he sustained, stated under Sub-division (5) of (a) of I hereinabove. (U. S. v. Barlow, 184 U. S. 123, 135-138.)

(c) The Court below refused to find the following facts,—

(1) The Court found that respondent required petitioner to use so heavy a roller on a road completed according to specifications, except for rolling, that it tore up the road and required refinishing; (at an extra cost of $5500., taking 30 days extra time); (R. 27; Petition and Brief, ps. 7, 8, 33), but

The Court refused to find the ultimate fact, (necescarily resulting from what it did find), that the roller was too heavy.

(2) This refusal was material because requiring the use of too heavy a roller was a breach of respondent's implied warranty that the roller would not be too heavy. (U. S. v. Spearin, 248 U. S. 132.)

(d) The Court below refused to find the following undisputed facts,—

(1) That the contract provided for inspection and approval of finished products, and that such approval would be binding except as to latent defects, (Plf's. Ex. 101, Contract p. 4).

(2) That certain windows and screens were so inspected and approved. (R. 13.)

(3) That an alleged defect of 3/8 of an inch space between the screens and contact rolls was a visible defect. (R. 36.)

(4) That respondent required petitioner to do extra work in remedying this alleged defect at a cost of $1700., and which took 30 days time. (R. 25, 26; Petition & Brief ps. 6, 33, 34.)

(5) That these refusals were material because doing this extra work to correct a visible defect entitled petitioner to recover its value. (Henderson Bridge Co. v. McGrath, 134 U. S. 260).

(e) That the Court below refused to find the following undisputed facts,—

(1) That respondent required petitioner to make five (5) attempts to put up a ceiling by the soldering process, (instead of by bolts as the contract provided), which proved to be a failure, which cost $1920., and delayed petitioner 33 days.

(2) That petitioner made earnest but futile efforts to use this process.

(3) That respondent abandoned the process as impossible, but not until it had required petitioner to make the five unsuccessful attempts. (Petition & Brief, ps. 6, 7, 34.)

(4) That this refusal is material because the attempts which respondent required petitioner to make were experimental and a failure, entitling petitioner to recover the extra cost. (U. S. v. Barlow, *supra.*)

II.

Respondent's answer (Brf. P. 7) to petitioner's claim as to the 65 major and the many day to day minor changes, and the resulting extra work and increased cost is that they depend upon the testimony of petitioner only, whom the Court was not obliged to believe. Such is not the rule applicable in this case:

(a) "A jury is generally authorized to accept the uncorroborated testimony of a party upon a matter regarding which there is no other evidence." (9 Cyc. of Ev. 515.)

(b) " 'The mere fact that the plaintiff, who testified to important particulars, was interested, was unimportant in view of the fact that there was no conflict in the evidence, or anything or circumstance from which an inference against the fact testified to by him could be drawn.' " (Chesapeake & O. R. Co. v. Martin, 283 U. S. 209, 218, 219.)

(c) Respondent's failure to contradict petitioner, and even to question on the issues involved its officer in charge, and its engineer who were in Court and examined

> "* * * is itself persuasive that their testimony, if given, would have been unfavorable to appellants" (here respondent). "* * *. Silence then becomes evidence of the most convincing character." (Interstate Circuit v. U. S., 306 U. S. 208, 226.)
>
> (d) "* * * and that suspicion should not outweigh uncontradicted evidence is quite strikingly shown in a recent decision * * * in Miller v. Herzfeld * * *, 4 F. (2d) 355, a case under this statute where improbability and suspicion might well have been given greater weight than in the present case." (Becker v. Miller, 7 F. (2d) 293, 295.)

(e) Petitioner was financially ruined through this and a companion case, and it was difficult for him to present his case, and impossible to produce additional witnesses, while the Government, with no financial problem, failed to call its inspector, its best witness, and did not even question the witnesses it swore on the material questions involved.

III.

Petitioner is entitled, as counsel believes, of right, to the material and controlling findings described under I hereinabove, under the decisions of this Court, a recent act of Congress, and the fifth amendment to the Constitution.

(a) Petitioner, as appears above, proved without dispute that he was entitled to recover on the only

two issues involved,—that there were a multitude of changes entailing work outside the contract, and that the buildings were constructed in an experimental way, (the issues as to the roller, the windows and screens, and the ceiling being part of these two main issues), but with these two, the only issues, uncontested and clearly established in his favor, the trial ended in an incomplete state,—no findings being made on either issue.

(b) This Court has uniformly held that a party is entitled to have findings made on all material issues, and has so held very recently in U. S. v. Esnault-Pelterie, 299 U. S. 201, 205. Such has been the ruling of this Court from the earliest days. (Mahan v. U. S., 14 Wall. 109-112.)

(c) This Court, in U. S. v. Esnault-Pelterie, 303 U. S. 26, 32, held that it could not review the facts because the Record did not contain the evidence due to

> "* * * the procedure * * * established by the Congress for the determination of claims against the United States,"

whereupon Congress passed the Act of May 22, 1939, §288, Title 28 USCA, providing that,—

> "* * * the Supreme Court shall have authority to review" (when the evidence has been certified to it), "in addition to other questions of law, errors assigned to the effect that * * * there is a failure to make any finding of fact on the material issues."

Congress thereby agreed with the rule established by this Court that the right to the completion of a trial should remain sacred and inviolate.

This is true generally. How much more so here with undisputed evidence, yet no findings!

(d) Because both of the multitude of changes respondent required, and of its requiring petitioner to construct the buildings experimentally, petitioner became entitled to the extra cost, plus a profit, which is property, of which he will be deprived without due process of law, unless findings on these two issues are made, and, so, a question is involved under the Fifth Amendment to the Constitution. (Fayerweather v. Ritch, 195 U. S. 276.)

(e) With more changes here than in any reported case, and with the buildings indisputably built experimentally, there is no possible defense to petitioner's recovery of the value of his work. Respondent sets up a release, but that it does not affect the claim now urged is fully shown at pages 15 and 16, and 35 to 37 incl., in petitioner's original brief and pages 4 to 6 of his reply brief; and besides, this Court holds that where, as here, respondent has been arbitrary and ignored petitioner's many protests, the latter is not bound by the failure to except damages from a release given. (U. S. v. Smith, 256 U. S. 11, 16.)

Moreover, petitioner's claim to payment for the amount retained for liquidated damages was expressly excepted. So, as to it, the right to Certiorari cannot, on any sound ground, be contested. (See Petitioner's Brief, ps. 38, 39.)

(f) This failure to make findings on all the issues is the ground of the appeal to this Court, and because

counsel feels that they may not have made this entirely clear, this petition for a rehearing is made.

IV.

(a) While petitioner did not urge it in his petition or briefs, and indeed it did not occur to him, is there not a grave public question in this case?

This Country is engaged in a herculean effort to prepare to defend itself against Foreign aggression. This necessitates efficiency and haste. It is in the hands of contractors, manufacturers and builders. Success depends on them.

It is of vital importance to them to know that the Government can not make many substantial changes or build experimentally without becoming liable for the increase in cost, and the Nation is interested to have the best efforts of the contractors undisturbed by worry whether they will be able to collect the amounts justly due them.

(b) The right to a completed trial is fundamental and basic one. The case at bar involves, as pointed out in the two preceding briefs, a conflict with all of the preceding cases on the issues involved. It is urged that a grave question, of vital importance to the Nation, is also at stake; and that to sustain the judgment below without findings of fact on the material issues, would deprive petitioner of his property without due process of law. (Fayerweather v. Ritch, *supra.*)

For all the foregoing reasons, including those set forth in the Petition, Brief and Reply Brief, petitioner urges that this petition for a rehearing and the writ of certiorari be granted.

Respectfully submitted.

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Dated: March 19, 1940.

Certificate of Counsel.

I, S. Wallace Dempsey, one of counsel for the above named petitioner, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

S. WALLACE DEMPSEY,
Counsel for Petitioner.